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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. FRANK CARLOS LARA, Defendant and Appellant.	B173599 (Los Angeles County Super. Ct. No. A628445)

APPEAL from an order of the Superior Court of Los Angeles County, John J. Cheroske, Judge. Affirmed.

Marylou Hillberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, and Jonathan J. Kline, Deputy Attorney General, for Plaintiff and Respondent.

Frank Lara appeals from an order denying his petition under Penal Code section 851.8 for a finding of factual innocence and destruction of the records of his 1984 arrest. We affirm.

BACKGROUND

On January 13, 2004, defendant filed a "Motion to Seal and Destroy Arrest Records Pursuant to: P.C. 851-8(A) and P.C. 851.8(L) Waiver of Time." In the motion, which was not served on the district attorney or any other prosecutorial agency, defendant declared as follows: He was arrested on May 11, 1984, when he was a passenger in a car that was stopped for a traffic infraction. A small amount of cocaine was found, but defendant was not aware of its existence. On May 16, 1984, he was convicted of misdemeanor possession of cocaine under Health and Safety Code section 11351 and was granted diversion (deferred entry of judgment) under Penal Code section 1000. (Further section references are to the Pen. Code.) He successfully completed the diversion program. On December 4, 1995, the case against him was dismissed based on his petition under section 1203.4, subdivision (a). (Nothing in defendant's declaration addressed the subject of "Waiver of Time.")

No response was filed to defendant's petition. On January 22, 2004, the petition was denied as follows: "The court finds that the defendant was granted relief pursuant to Penal Code Sections 1000 and 1203.4. This does not entitle the defendant to a finding of factual innocence."

DISCUSSION

Section 851.8 provides that upon a finding of factual innocence, the records of a defendant's arrest are to be sealed and eventually destroyed. As pertinent to this case, the procedure to be employed is as follows:

"In any case where a person has been arrested, and an accusatory pleading has been filed, *but where no conviction has occurred*, the defendant may, at any time after dismissal of the action, petition the court which dismissed the action for a finding that the defendant is factually innocent of the charges for which the arrest was made. A copy of such petition shall be served on the district attorney of the county in which the accusatory

pleading was filed at least 10 days prior to the hearing on the petitioner's factual innocence. The district attorney may present evidence to the court at such hearing. Such hearing shall be conducted as provided in subdivision (b). If the court finds the petitioner to be factually innocent of the charges for which the arrest was made, then the court shall grant the relief as provided in subdivision (b)." (§ 851.8, subd. (c), italics added.)[1]

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[1] Section 851.8, subdivision (b), provides: "If, after receipt by both the law enforcement agency and the district attorney of a petition for relief . . . , the law enforcement agency and district attorney do not respond to the petition by accepting or denying such petition within 60 days after the running of the relevant statute of limitations or within 60 days after receipt of the petition in cases where the statute of limitations has previously lapsed, then the petition shall be deemed to be denied. In any case where the petition of an arrestee to the law enforcement agency to have an arrest record destroyed is denied, petition may be made to the superior court which would have had territorial jurisdiction over the matter. A copy of such petition shall be served on the district attorney of the county having jurisdiction over the offense at least 10 days prior to the hearing thereon. The district attorney may present evidence to the court at such hearing. Notwithstanding Section 1538.5 or 1539, any judicial determination of factual innocence made pursuant to this section may be heard and determined upon declarations, affidavits, police reports, or any other evidence submitted by the parties which is material, relevant and reliable. A finding of factual innocence and an order for the sealing and destruction of records pursuant to this section shall not be made unless the court finds that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made. In any court hearing to determine the factual innocence of a party, the initial burden of proof shall rest with the petitioner to show that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made. If the court finds that this showing of no reasonable cause has been made by the petitioner, then the burden of proof shall shift to the respondent to show that a reasonable cause exists to believe that the petitioner committed the offense for which the arrest was made. If the court finds the arrestee to be factually innocent of the charges for which the arrest was made, then the court shall order the law enforcement agency having jurisdiction over the offense, the Department of Justice, and any law enforcement agency which arrested the petitioner or participated in the arrest of the petitioner for an offense for which the petitioner has been found factually innocent under this section to seal their records of the arrest and the court order to seal and destroy such records, for three years from the date of the arrest and thereafter to destroy their records of the arrest and the court order to seal and destroy such records. The court shall also order the law enforcement agency having jurisdiction over the offense and the Department of Justice to
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In denying defendant's petition, the trial court referred to sections 1000 and 1203.4. Under section 1000.4, subdivision (a), with limited exceptions, when a defendant successfully completes a deferred entry of judgment program, "the arrest upon which the judgment was deferred shall be deemed to have never occurred." Also with limited exceptions, when a defendant successfully completes probation, he is entitled to withdraw his plea and "the court shall thereupon dismiss the accusations or information against the defendant." (§ 1203.4, subd. (a).)

We need not decide whether, as an abstract proposition, defendant was disqualified from seeking a declaration of factual innocence under section 851.8 because he had already gained relief under sections 1000.4 and 1203.4. We first address the statute of limitations issue.

Section 851.8 was added to the Penal Code effective September 29, 1980. (Stats. 1980, ch. 1172, p. 3939.) In arguing that the statute of limitations did not bar defendant's petition, counsel on appeal relies on the first sentence of section 851.8, subdivision (c), which permits the petition to be filed "at any time after dismissal of the action." But defendant's reference to section 851.8, subdivision (*l*) in the caption of his motion was particularly apt because that provision of the statute specifically addresses the proper filing period for the petition, as follows:

"For arrests occurring on or after January 1, 1981, and for accusatory pleadings filed on or after January 1, 1981, petitions for relief under this section may be filed up to two years from the date of the arrest or filing of the accusatory pleading, whichever is later. Until January 1, 1983, petitioners can file for relief under this section for arrests

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request the destruction of any records of the arrest which they have given to any local, state, or federal agency, person or entity. Each state or local agency, person or entity within the State of California receiving such a request shall destroy its records of the arrest and the request to destroy such records, unless otherwise provided in this section. The court shall give to the petitioner a copy of any court order concerning the destruction of the arrest records."

which occurred or accusatory pleadings which were filed up to five years prior to the effective date of the statute. Any time restrictions on filing for relief under this section may be waived upon a showing of good cause by the petitioner and in the absence of prejudice."

Defendant was arrested and placed on diversion in 1984, more than 18 years before his section 851.8 petition was filed. Although he did not state when he successfully completed his diversion program, his petition under section 1203.4 was granted on December 4, 1995, which is still more than eight years before his section 851.8 petition was filed. And in his section 851.8 petition, defendant did not set forth any facts that would provide good cause for his delay. Finally, he did not serve his pleading on the district attorney, nor was a representative of that office or any other prosecutorial agency present when the petition was heard. Accordingly, it was properly denied.

Defendant further suggests that, even if he is not entitled to relief under section 851.8, his petition should have been considered under recently enacted section 851.90, which empowers the trial court at a hearing to dismiss charges following the completion of a deferred entry of judgment program to order that the arrest records be sealed. (Stats. 2003, ch. 792 (Sen. Bill No. 599), § 1.)[2] As defendant did not request section 851.90 relief in his petition, we do not consider it.

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[2] Section 851.90, subdivision (a)(1), provides: "Whenever a person is diverted pursuant to a drug diversion program administered by a superior court pursuant to Section 1000.5 or is admitted to a deferred entry of judgment program pursuant to Section 1000, the person successfully completes the program, and it appears to the judge presiding at the hearing where the diverted charges are dismissed that the interests of justice would be served by sealing the records of the arresting agency and related court files and records with respect to the diverted person, the judge may order those records and files to be sealed, including any record of arrest or detention, upon the written or oral motion of any party in the case, or upon the court's own motion, and with notice to all parties in the case."

As explained in a staff analysis of the statute, its purpose was to put a stop to the practice by which employers would retain investigators to search through job applicants' arrest and court records and use those records in hiring decisions even though the

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DISPOSITION

The order under review is affirmed.

NOT TO BE PUBLISHED.

MALLANO, J.

I concur:

SPENCER, P. J.

I concur in the judgment only.

VOGEL, J.

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applicant had successfully completed a diversion program. (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 599 (2003-2004 Reg. Sess.) pp. 3–4.)